



November 28, 2001

Ms. Tina Plummer
Open Records Coordinator
Texas Department of Mental Health and Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR2001-5504

Dear Ms. Plummer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155373.

The Texas Department of Mental Health/Mental Retardation (the "department") received a written request from a department employee for records pertaining to allegations that the requestor is having an affair with a co-worker. You have submitted to this office as responsive to the request employees' handwritten statements and other notes from employee interviews created as a result of an employee complaint. You contend that the submitted information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code.

You first contend that the information at issue is protected by common law privacy in accordance with *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), and therefore must be withheld from the public pursuant to section 552.101 of the Government Code. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information coming within the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976) (common law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and is of no legitimate concern to the public).

In *Morales v. Ellen*, the court addressed the applicability of the common law privacy doctrine to files of an administrative investigation of allegations of sexual harassment in the workplace and concluded that individual witness statements and the identities of those witnesses were protected from public disclosure under common law privacy. After reviewing the information at issue here, however, we conclude that *Ellen* is inapposite in this

instance. Unlike the information before the court in *Ellen*, the information at issue here does not concern an allegation of sexual harassment, but rather appears to consist of charges of favoritism. Consequently, the analysis found in *Ellen* is inapplicable here. Furthermore, we believe that there is a legitimate public interest in allegations of favoritism in the workplace. Cf. Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). We have, however, identified some information that implicates the privacy interests of one employee.¹ We have marked the information the department must withhold pursuant to section 552.101 in conjunction with the common law right of privacy. The remaining information you submitted to our office must be released, with the following possible exception.

Exhibit C contains the social security number of the complaining employee. Section 552.117(1) of the Government Code requires that the department withhold, among other things, an employee's social security number, but only if the employee elected to keep this information confidential in accordance with section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Therefore, in order to withhold section 552.117(1) information from disclosure, a proper election must be made prior to the receipt of the request for information. In this instance, if the employee did not elect prior to the department's receipt of the request to keep his social security number confidential under section 552.024, that information may not be withheld from public disclosure based on section 552.117(1) of the Government Code. If the employee previously made such an election, the department must withhold the social security number.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

¹Other information you have highlighted implicates the privacy interests of the requestor. However, the requestor has a special right of access to this information pursuant to section 552.023 of the Government Code. Consequently, we caution the department to request another decision from this office in the event it receives another request for these records in the future.

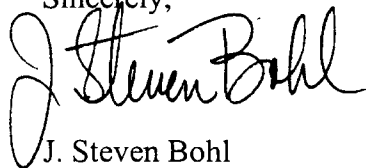
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Steven Bohl". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/RWP/sdk

Ref: ID# 155373

Enc: Submitted documents